IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1304

JAMES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., and WILLIAM JAMES HELLIESEN,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMICI CURIAE

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MISCELLANEOUS

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Statement of Interest of Amici

The Amici Curiae herein, one of at least two groups of Amici who are, with the consent of the parties to the Writ, filing a brief with the Court, are two Federal prisoners serving sentences for narcotics violation convictions. Gerson Nagelberg is presently an inmate at the Federal Penitentiary at Lewisburg, Pennsylvania, and Vivienne Nagelberg, at the Massachusetts Correctional Institution for Women at Framingham, Massachusetts.

Both were convicted after trial in the United States District Court for the Southern District of New York, of violations of the former 21 U.S.C. §§ 173 and 174, and conspiracy so to do. Both were sentenced on June 18, 1970; thereafter, the convictions were affirmed by the Second Circuit Court of Appeals, 434 F. 2d 585 (1971), and certiorari was denied by this Court, 401 U.S. 939, 91 S. Ct. 935 (1971). Following the denial of certiorari, a timely Rule 35 motion was granted to the extent of reducing each sentence, and amended judgments, dated November 30, 1971, were entered.

In the amended judgment, the sentencing court specifically provided for parole at the discretion of the Board of Parole, pursuant to 18 U.S.C. § 4208 (a) (2), "if applicable".

Because of advice from the administrative authorities that (i) those authorities did not consider the Amici to be eligible for parole, and had so marked their prison files; (ii) that the necessary information and files for parole consideration had not been forwarded to the Board of Parole; and (iii) that the administrative action was final, the Amici commenced an action under 28 U.S.C. § 1361, in the nature of mandamus seeking to compel those authorities to comply with the amended judgment of the Court. *Vivienne Nagelberg and Gerson Nagelberg* v. *Richard G. Kleindienst, et al.*, S.D.N.Y., Docket No. 72 Civ. 4088. Issue was joined by service of defendants' answer dated November 27, 1972.

It is the position of the Amici herein that the savings clause contained in the repealing legislation, Comprehensive Drug Abuse, Prevention and Control Act of 1970, either conflicts with, or controls, by narrowing the scope of, the general savings clause, 1 U.S.C. § 109; that the term "prosecutions" which is used in the savings clause does not include the post-sentence concept of parole; that the provisions providing for a denial of parole are not

provisions providing for punishment but for the denial of privileges and thus are not such as would be saved; that notwithstanding the savings clause, there is nothing contained therein which provides that the Court must adhere to old law; that there are constitutional infirmities to the invocation of the savings clause to the applicability of parole privileges to some, but not other, similarly situated Federal prisoners; and that the Congressional purpose is frustrated by the continued denial of parole consideration to a degree that it becomes cruel and unusual punishment.

The Amici Curiae herein present another of the factual variations which the repeal of certain statutes has created. Those variations, all of which resolve themselves about the effective date of May 1, 1971, can be denoted as follows:

i) Commission prior—trial prior—sentence prior

ii) Commission prior—trial prior—sentence subsequent

iii) Commission prior—trial subsequent—sentence subsequent.

Actually, since if any date is determinative, it is that of entrance of judgment, they can be reduced conceptually to those whose final judgment is entered prior and those whose final judgment is entered subsequent. The Amici herein deem themselves to be in the latter group, as are the Petitioners herein, in view of the fact that the Amicis' convictions and sentence did not become final until the favorable determination of the motion for reduction under Rule 35, when the amended judgment was entered, November 30, 1971.

Summary of Points Argued

1. The no-parole provision of 26 U.S.C. § 7327 (d) being as it is, not a positive imposition of sentence (the positive mandates being contained within 26 U.S.C. § 7327 (a) and

21 U.S.C. §§ 173 and 174), and parole not being a substantive right, denial of parole consideration is but a non-judicial and remedial matter and not a substantive liability, and is not such that: i) it is saved by either savings clause (Pub. Law 91-513, § 1103, and 1 U.S.C. § 109); or ii) the integrity of the law or judicial process is offended by its non-saving.

2. Notwithstanding the savings clause, there is no absolute denial to the Courts of the power to provide for parole in a sentence otherwise conforming to the former law, if it sees fit, and a judgment and sentence entered after May 1, 1971, which avoids the "no-parole" provisions, should be deemed legal and proper.

3. If they are to be construed as within the constitutional standards of due process and equal protection, statutes such as the savings clause in the subject legislation, must expressly, or by implication, be deemed to contain the proviso of *Jones* v. *United States*, 327 F. 2d 867 (D.C. Cir., 1963).

4. Congressional intent would be frustrated by the application of either 1 U.S.C. § 109, or the savings clause of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, to the case at bar, and the denial of parole, no longer serving a legislative purpose or function, is a violation of the Eighth Amendment's proscription of cruel and unusual punishment.

POINT I

The "no parole" provisions are not substantive liabilities saved by Pub. Law 91-513, § 1103 or 1 U.S.C. § 109.

The Petitioners were sentenced under 26 U.S.C. 7237 (b) for violations of 26 U.S.C. § 4705 (a). The Amici herein were sentenced under 21 U.S.C. §§ 173 and 174, for violation of those statutes.

The petitioners' sentencing statute, 26 U.S.C. § 7237 (b) contains a mandatory minimum sentence of five (5) years, as does the Amicis' herein, also five years. 21 U.S.C. § 173.

Both the sentences of the petitioners and of the Amici are affected by the terms of 26 U.S.C. § 7237 (d) which states that:

"(d) Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section . . .

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply."

Effective May 1, 1971, both the substantive violation statute, 26 U.S.C. § 4705 and the sentencing statute, 26 U.S.C. § 7237 (and, in the case of the Amici, the all-inclusive 21 U.S.C. §§ 173 and 174) were repealed and in their place were substituted the provisions of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, 21 U.S.C. §§ 801, *et seq.*

That legislation included a savings clause, Public Law 91-513, § 1103 (contained as a note to 21 U.S.C. § 171), which reads:

"(a) Prosecutions for any violation of law occurring prior to the effective date of section 1101, shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof.

"(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or

abated by reason thereof." [Pub. L. 91-513 Section 1103.]

The first question then, which was undertaken by the Petitioners, is what the savings clause was intended to save, and concurrently, the effect, if any, of this savings clause on the general savings clause now contained at 1 U.S.C. § 109, which reads:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Parenthetically, respecting the applicability of 1 U.S.C. § 109, the Court must also consider whether the Comprehensive Drug Abuse, Prevention and Control Act of 1970 is not a *de facto* amendment of the previously disjointed provisions (which ranged through Titles 18, 19, 21, 26, 28, 31, 40, 42, 46 and 49). Just as amendatory legislation can be by implication and intent a *de facto* repeal, so too, where express intent and implied terms of repealing and repealed acts so indicate, they should be construed as, in fact, amendatory. *United States* v. *Tynen* (1871), 11 Wall. 88, 78 U.S. 88, 20 L. Ed. 153. If so, then giving the necessary effect to substance over form, and invoking the rule of strict construction with respect to criminal matters, 1 U.S.C. § 109 should be deemed not to apply since it specifically refers only to repeal situations.

To the extent that suspensions of sentence and probation are judicially imposed by, and subject to the surveillance, the Court, a distinction can be made as between those dispositions and parole, although the weight of authority ap-

pears to hold them as separate from sentence. See *United States ex rel. Voorhees* v. *Hill* (D. C. Penn., 1934), 6 F. Supp. 922 at 922, quoting 36 Op. Attys. Gen. 186:

> "The suspension of execution of sentence or grant of probation are acts separate and distinct from the judgment or sentence of the court and can not be regarded as being part of such judgment or sentence . . ."

Nonetheless, an arguable distinction can be made and is called to the Court's attention.

Parole, on the other hand, is an aspect of the "correctional process", is obtained through the administrative process and at the discretion of the Board of Parole, not of the Courts.

> "Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive." [*Morrissey* v. *Brewer*, (1972) —— U.S. ——, 92 S. Ct. 2593 at 2600, —— L. Ed. 2d ——].

Hence, the allowance of parole consideration to narcotics offenders sentenced after the effective date of the new law, does not offend the judicial integrity which is sought to be protected by the savings clauses. Such persons in the position of the Petitioners and Amici are still convicted and sentenced under the former provisions.

The general savings clause (and by the application of the same reasoning, the specific savings clause) has been held to save only substantive rights and liabilities.

> ". . . the Supreme Court, in three cases interpreting former § 13, has held that it saves existing substantive rights and liabilities from repeal but does not

preserve 'remedies' or 'procedure' prescribed in the repealed statute. [*United States* v. *Obermeier* (2nd Cir., 1950) 186 F. 2d 243 at 253].

See *Great Northern Railway Co.* v. *United* (1907), 208 U.S. 452, 28 S. Ct. 313, 52 L. Ed. 567; *Herts* v. *Woodman* (1909), 218 U.S. 205, 30 S. Ct. 621, 54 L. Ed 1001; and, *Hallowell* v. *Commons* (1915), 239 U.S. 506, 36 S. Ct. 202, 60 L. Ed. 409.

The savings clause has also been held not to effect regulations or orders promulgated under a repealed statute. *United States* v. *Hark*, 49 F. Supp. 95 (D. Mass., 1943).

By application of the reasoning in *Obermeier, supra*, to the penal situation, the "unalterable substantive liability" [186 F. 2d at 254-255], at least as regards the Amici herein, is the act proscribed in former 21 U.S.C. §§ 173 and 174 and the penalty therein provided.

If it can be said of probation that:

> "Placing probationer upon probation did not affect the finality of the judgment. Probation is concerned with rehabilitation, not with determination of guilt." [*Berman* v. *United States* (1937), 302 U.S. 211 at 213, 58 S. Ct. 164, at 166].

Then it can be said even more forcefully of parole. Added to this, are the statements of this Court, that ". . . revocation of parole is not part of a criminal prosecution . . ." [*Morrissey* v. *Brewer, supra*, 92 S. Ct. at 2600]. Intrinsic in this statement is the corollary that parole granting is likewise not a part of a criminal prosecution. In fact, the Court in *Morrissey*, seemed to adopt the intermediate court's reasoning that, '. . . parole is only "a correctional device authorizing service of sentence outside the penitentiary" . . .' [92 S. Ct. at 2597]

It can be said in no uncertain terms that, notwithstanding the rights which might attach to parole or probationary status once granted, parole and probation are privileges and not substantive rights. It follows, then, that their denial is not a substantive liability which attaches to the criminal act and sentence so as to be likewise saved. (See *United States* v. *Obermeier, supra*, 186 F. 2d at 254-255).

Thus, the result urged upon the Court by the Petitioners and Amici herein offends the integrity of neither the former law, the new legislation, nor the judicial process.

POINT II

The savings clause in the Comprehensive Drug Abuse, Prevention and Control Act of 1970 does not constitute a bar to ultilization of parole provisions by the Court.

That the "no parole" provision is not part of the prosecution, conviction and sentence, is the argument made by the Petitioner. Likewise, it is argued above (at Point I) that as a non-substantive or administrative matter, the savings clause does not continue its existence.

An additional corollary suggests itself, in effect, that the Court is afforded the opportunity (constitutionally required as argued, see Point III) of invoking the parole provisions as it sees fit. Several recent Courts of Appeal have expressly or impliedly approved this alternative and the fact that parole is not a part of the prosecution, such that the latter is "affected" (see P. L. 91—513, § 1103 (a)), supports this approval.

Notwithstanding the acceptance by other Circuits of *United States* v. *Fiotto* (2nd Cir., 1972), 454 F. 2d 252, and cases like it, as indicative of a position opposite to that of the Ninth Circuit in *United States* v. *Stephens* (9th Cir., 1971), 449 F. 2d 103, and *United States* v. *Fifthian*

(9th Cir., 1971), 452 F. 2d 505, see for instance, *Page* v. *United States* (10th Cir., 1972), 459 F. 2d 467, we find a basis for suggesting otherwise.

Stephens, of course, was a situation where the defendant, after being sentenced under the provisions of the old law, was granted a suspension of sentence and probation. There is, thus, an additional question not touched upon by the Amici herein, to wit: can the same argument as made for parole, be made for judicial suspension of sentence?

However, respecting the parole aspect, it is not clear that the Second Circuit's opinion is the antithesis of the reasoning of *Stephens*, for that Court merely said, in *Fiotto*, that imposition of sentence under 26 U.S.C. § 7237 was correct. The same Circuit had said earlier, in *United States* v. *Wooden* (2nd Cir., 1971), 453 F. 2d 1258:

> "Of course, the district court is free to entertain motions from the parties to reconsider the sentence. Rule 35, F. R. Crim. P. If such a motion is made, that Court may then consider United States v. Stephens, 449 F. 2d 103 (9th Cir., 1971); United States v. Caraballo, 321 F. Supp. 843 (S.D.N.Y. July 19, 1971) aff'd without opinion (2nd Cir. Oct. 1, 1971), and United States v. Fiotto, Doc. 71-1641, currently pending in this Court, concerning the effect of the repeal of certain statutory provisions having to do with sentence." [*id.* at 1258]

Similarly, the language in *United States* v. *Carr* (7th Cir., 1972), 459 F. 2d 16 at 18-19, indicates that Court is of the same feeling.

While the overwhelming majority of cases certainly can be cited in opposition to the principle, it should be pointed out that in those cases, as in the case at bar, the question has been presented in a manner lending itself to the interpretation which the Respondent herein urges. It

presents the issue in the context of the question: "Is a sentence under the former statutory provisions susceptible to attack under a Rule 35 motion or on direct appeal as an illegal sentence?" In other words, can a defendant *demand* parole? However, under this argument, we pose to the Court the additional issue as to whether a sentence under the old provisions but allowing for parole, is also legal.

POINT III

To conform to the constitutional standards of equal protection the savings clause of the new law must be deemed to provide a basis for distinction between defendants other than the effective date of the new legislation.

Morrissey v. *Brewer, supra,* clearly determined, as have other cases, see *Mempha* v. *Rhay* (1967), 389 U.S. 128; *Ernest* v. *Willingham* (10th Cir., 1969), 406 F. 2d 681; *United States* v. *Hines* (10th Cir., 1969), 419 F. 2d 173; *Brown* v. *Kearney* (5th Cir., 1966), 355 F. 2d 173; and *Martin* v. *United States* (4th Cir., 1950), 183 F. 2d 436, that parolees and probationers have certain basic, constitutional rights and that such procedural safeguards attach to the revocation process, as the particular constitutional right demands. It would be illogical and unreasonable to assume that the constitution does not similarly govern the benefaction process to the extent that, at the very least, equal protection under the Fifth and Fourteenth Amendments must be afforded.

That an otherwise valid statute could not avoid constitutional infirmities is *ipse dixit.* Legislation cannot vitalize an otherwise constitutionally debilitated concept. The distinction or classification between similarly situated persons in the application of privileges and rights, cannot be arbitrary, as in this case. As this Court stated in *Baxstrom* v.

Herold (1966), 383 U.S. 107 at 111; 86 C. Ct. 760, 15 L. Ed. 2d 620:

> "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Walters v. City of St. Louis, 347 U.S. 321, 237, 74 S. Ct. 505, 509, 98 L. Ed. 660."

This principle applies to persons in the position of the Petitioners and the Amici herein.

Another way of expressing the same thought, is that the application of "no parole" provisions to a sentence subsequent to May 1, 1971, becomes the imposition of an unconstitutional condition to a sentence, a principle recently repudiated in *Frazier* v. *Jordan* (5th Cir., 1972), 457 F. 2d 726, which was based, in turn, upon this Court's decisions in *Williams* v. *Illinois* (1970), 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586; *Morris* v. *Schoonfield* (1970), 399 U.S. 508, 90 S. Ct. 2232, 26 L. Ed. 2d 773; and *Tate* v. *Short* (1971), 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130.

If there is to be any effective saving of the "no parole" provision it must therefore be on a basis more rational and less arbitrary than that of a mere date on a calendar. In effect, with the passage of the Comprehensive Act of 1970, the legislature created a special class of cases, to wit: those defendants who are convicted under prior law but sentenced after the effective date.

In the past, statutes revising penalties have contained a proviso which avoids the constitutional difficulty posed herein. Such a case is *Jones* v. *United States* (D. C. Cir., 1963), 327 F. 2d 867, which was an instance where no new crime was created but where the legislation dealt with a revision of punishment (in that case, the punishment for murder). The legislation included the provision:

> "Cases tried prior to the effective date of this Act and which are before the court for the purpose of sentence

or resentence *shall be governed by the provisions of law in effect prior to the effective date of this Act: Provided,* That the judge may, in his sole discretion, consider circumstances in mitigation and in aggravation and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment, in which event he shall sentence the defendant to life imprisonment. Such a sentence of life imprisonment shall be in accordance with the provisions of this Act. (Emphasis in the original.)" [*id.*, at page 870]

So, too, here, the legislation, if it is not to be construed unconstitutionally, must be implied to contain such a provision authorizing judicial discretion, and not in a way as to demand the absolute and discriminatory applications of the old provisions.

The opinions rendered by this Court in *Furman* v. *Georgia*, No. 69-5003, —— U.S. ——, 92 S. Ct. 2726 —— L. Ed. 2nd —— (1972) and its companion cases, lend themselves to this view. Though dealing in the main with the question of whether the death penalty is unconstitutional, the Court also recognized that the issue there is derived from the "basic theme of equal protection" [92 S. Ct. at 2732, opinion of Douglas, J.].

This case represents a situation which, if the Respondent's position is accepted, is violative of the Equal Protection Clause by its terms, or, if viewed only from the point of decisional law, is arbitrary in its application. Its application has none of the attributes of "informed selectivity" [92 S. Ct. at 2754] which might save it, unless this Court requires them to be read into the terms of the savings clause by necessary implication.

POINT IV

The construction urged by the respondent frustrates Congressional intent and renders the denial of parole a cruel and unusual punishment.

(a) 1 U.S.C. § 109

The principle embodied, perhaps impliedly more than expressly, in *Hamm* v. *City of Rock Hill*, and the historical basis for the general savings statute, is that an evidenced intent to change the penalty should not, by technical rule, abate, too, the substantive crime, a result not intended. That case, aside from ascribing a place for 1 U.S.C. § 109 as a final bulwark against unintended results, points up the importance of congressional intent to any interpretation, that the spirit of the legislation can, and indeed, should, overcome the word. Just as an unwanted result should not irrevocably attach to an intended change, an intended change should not by hypertechnical application, decree an unwanted result.

Behind the statute was the common law rule that with the repeal of an act without any reservation of its penalties, all criminal proceedings taken under it fell as to those persons on whom sentence had not yet been imposed. See *Yeaton* v. *United States* (1809), 5 Cranch 281; *United States* v. *Reisinger* (1888), 128 U.S. 398, 9 S. Ct. 99. "The basis for the rule was a presumption that the repeal was intended as a legislative pardon for past acts." *United States* v. *Hark* (D.C. Mass. 1943), 49 F. Supp. 15 at 97. Thus, 1 U.S.C. § 109 was passed to avoid the inadvertent and absolute application of the rule, and necessarily the presumption, where the underlying intent was absent.

The distinction between a technical abatement and non-technical abatement was clearly made by *United States* v. *Stephens* (9th Cir., 1971), 449 F. 2d 103, at page 105, note 6. The general savings clause serves as a stopgap to inadvertency. But just as avoidance of the inadvertent application of the common law rule was sought, so should the

inadvertent application of the statute where congressional intent is manifests opposition to such application. Therefore, by intent, § 109 should not apply; by reason, it should not *be* applied.

(b) Pub. L. 91-513, 84 Stat. 1236 (nt. to 21 U.S.C. § *171*)

As to the purpose and intent of the Comprehensive Drug Abuse and Prevention Act of 1970, the Congressional reports make this clear:

> "If the abuser is to be penalized, he should not be penalized in the spirit of retribution. The modern concept of criminology should apply—that penalties fit offenders as well as offenses. . . . When the penalties involve imprisonment, however, rehabilitation of the individual, rather that retributive punishment, should be the major objective." [House Report No. 91-1444, U. S. Code, Congressional and Administrative News, 1970, Vol. 3, page 4575]

Indeed, in that same report, under the caption, "Principal Purpose of the Bill", was written, "This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States. . . (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs." [*id.*, at page 4567]. But the effect given it by most of the cases of persons in the positions of the Petitioners and the Amici, is precisely the opposite in this regard as among persons guilty of similar acts. It has become a situation even more disparate and retributive by virtue of the judicial non-recognition or misapplication of this new legislation.

To quote further from the indicators of Congressional intent:

> "The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the of-

fense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences." [*Id.*, at 4576]

And, discussing the bill in terms of the Prettyman Commission and Katzenbach Commission Recommendations, it was stated, respectively:

"12. The Commission recommends that the penalty provisions of the Federal Narcotics and marijuana laws which now prescribe mandatory minimum sentences and prohibit probation and parole be amended to fit the gravity of the particular offense so as to provide a greater incentive for rehabilitation.

Action. As discussed earlier in this report, elimination of almost all mandatory sentences, as well as elimination of the prohibition against probation and parole of narcotic offenders, is accomplished by this bill." [*Id*, at p. 4585]

"(3) Recommendation. State and Federal drug laws should give a large enough measure of discretion to the courts and correctional authorities to enable them to deal flexibly with violators, taking account of the nature and seriousness of the offense, the prior record of the offender and other relevant circumstances.

Action. The penalty structure set forth in the reported bill provides a flexible system of penalties for Federal offenses, in accordance with both this recommendation and recommendation No. 12 of the Pretty-

man Commission. The recommended Model State law also contains similar provisions." [*Id.*, at p. 4587-4588]

It is clear that Congress has the power to create the effect we argue here, that is, to abate the application of the parole denial statute *vis-a-vis* pending convictions which are still susceptible of direct action or relief. As stated in *Hamm* v. *City of Rock Hill, supra*, 379 U.S. at 316:

> "In our view Congress clearly had the power to extend immunity to pending prosecutions . . . We have found Congress has ample power to extend the statute to pending convictions . . ."

The congressional intent and purpose expressed in the above-quoted reports certainly evidences such an extension of immunity. But even absent such expressions of intent, the abatement of the 'no parole" provisions should be read into the new legislation. Again, as stated by this Court in the *Hamm* case, cited earlier:

> "It is apparent that the rule exemplified by Chambers* does not depend on the imputation of a specific intention to Congress in any particular statute. None of the cases cited drew on any reference to the problem in the legislative history or the language of the statute. Rather the principle takes the more general form of imputing to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose and would be unnecessarily vindictive. This general principle, expressed

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*A rule of abatement which in *United States* v. *Chambers* (1933), 29 U.S. 217, the Court appeared to base on the specific legal precept that Congress could not give effect to that to which the Constitution had denied vitality. The Supreme Court, here in *Hamm*, seemed to raise that specific precept above that level to one of general principle.

in the rule, is to be read wherever applicable as part of the background against which Congress acts." [379 U.S. at 313]

Certainly, Congress had no intention to remove criminal sanction from the particular illegal acts, and for this reason, the savings clause had to be included. But the Congress did intend to adjust the methods by which the particular sanctions are applied and the savings clause must not be construed to frustrate in part or in whole this Congressional purpose. Congress, in passing the savings clause, was interested, in sustaining, not parole denial, but rather the criminal liability for such acts as covered by the repealed statutes.

It follows from this argument, that the application of "no parole" provisions becomes excessive and no longer serves a valid legislative purpose. Thus, this argument may be extended to the constitutional level that imposition of the "no parole" provisions is violative of the Eighth Amendment's proscription of cruel and unusual punishment. See *Furman* v. *Georgia*, No. 69-5003, 92 S. Ct. 2726 (1972), the opinions of Douglas, J. and Brennan, J.

CONCLUSION

For the reasons herein stated the amici request that the Court construe the repeal of 26 U.S.C. § 7237 (d) as a removal of the bar to parole to imprisoned narcotics offenders sentenced after May 1, 1971, under the old law.

Respectfully submitted,

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Dated: New York, N. Y., January 2, 1973.

OPINION

SUPREME COURT OF THE UNITED STATES

Syllabus

BRADLEY ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 71–1304. Argued January 8, 1973—Decided March 5, 1973

On May 6, 1971, petitioners were convicted and sentenced for narcotics offenses committed in March 1971. They received the minimum five-year sentences under a provision that was mandatory and made the sentences not subject to suspension, probation, or parole. Effective May 1, 1971, that provision was repealed and liberalised by the Comprehensive Drug Abuse Prevention and Control Act of 1970. On petitioners' motion for vacation of their sentences and remand for resentencing, the Court of Appeals held that the new provisions were unavailable in view of the Act's saving clause, which made them inapplicable to "prosecutions" antedating the Act's effective date. *Held:*

1. The word "prosecutions" in the saving clause is to be accorded its normal legal sense, under which sentencing is a part of the concept of prosecution. Therefore, the saving clause barred the District Judge from suspending sentence or placing petitioners on probation. Pp. 2–5.

2. Under the saving clause, parole under 18 U. S. C. § 4208 (a) is likewise unavailable to petitioners, since by its terms that provision is inapplicable to offenses for which a mandatory penalty is provided; and, in any event, a decision to grant early parole under that provision must be made "[u]pon entering a judgment of conviction," which occurs before the end of the prosecution. Pp. 5–6.

455 F. 2d 1181, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Part I of which BRENNAN and WHITE, JJ., joined. BRENNAN and WHITE, JJ., filed a statement concurring in the judgment. DOUGLAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 71-1304

Charles B. Bradley, Jr., et al., Petitioners, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[March 5, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether a District Judge may impose a sentence of less than five years, suspend the sentence, place the offender on probation, or specify that he be eligible for parole, where the offender was convicted of a federal narcotics offense that was committed before May 1, 1971, but where he was sentenced after that date. Petitioners were convicted of conspiring to violate 26 U. S. C. § 4705 (a) (1964 ed.) by selling cocaine not in pursuance of a written order form, in violation of 26 U. S. C. § 7237 (b) (1964 ed. and Supp. V). The conspiracy occurred in March 1971. At that time, persons convicted of such violations were subject to a mandatory minimum sentence of five years. The sentence could not be suspended, nor could probation be granted, and parole pursuant to 18 U. S. C. § 4202 was unavailable. 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V). These provisions were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, 21 U. S. C. § 801 *et seq.* The effective date of that Act was May 1, 1971, five days before petitioners were convicted.

Each petitioner was sentenced to a five-year term.[1] On appeal to the Court of Appeals for the First Circuit, various points, not here relevant, were raised. Following affirmance of their convictions, petitioners moved that their sentences be vacated and their cases be remanded to the District Court for resentencing pursuant to Rule 35, Fed. Rule Crim. Proc. In their motion they contended that the District Court should have considered "certain sentencing alternatives, including probation, suspension of sentencing and parole" which became available on May 1, 1971. The Court of Appeals considered this motion as an "appendage" to the appeal. It held that the specific saving clause of the 1970 Act, § 1103 (a), read against the background of the general saving provision, 1 U. S. C. § 109, required that "narcotics offenses committed prior to May 1, 1971, are to be punished according to the law in force at the time of the offense," and that "under the mandate of § 109 the repealed statute, § 7237 (d) is 'to be treated as still remaining in force.'" 455 F. 2d 1181, 1190, 1191. Accordingly, the Court of Appeals held that the trial judge lacked power to impose a lesser sentence.

We granted the petition for writ of certiorari, 407 U. S. 908 (1972), in order to resolve the conflict between the First and Ninth Circuits, see *United States* v. *Stephens*, 449 F. 2d 103 (CA9 1971).[2]

I

At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition

[1] Petitioners Bradley, Helliesen, and Odell were found guilty also of unlawfully carrying a firearm during the commission of a felony, in violation of 18 U. S. C. § 924 (c)(2). Each was sentenced to one year in prison; the sentences were suspended, and each was placed on probation for three years on these counts.

[2] See also *United States* v. *McGarr*, 461 F. 2d 1 (CA7 1972); *United States* v. *Fiotto*, 454 F. 2d 252 (CA2 1971).

in the highest court authorized to review them. See *Bell* v. *Maryland*, 378 U. S. 226, 230 (1964); *Norris* v. *Crocker*, 13 How. 429 (1851). Abatement by repeal included a statute's repeal and re-enactment with different penalties. See 1 J. Sutherland, Statutes and Statutory Construction § 2031 n. 2 (3d ed. 1943). And the rule applied even when the penalty was reduced. See, *e. g.*, *The King* v. *M'Kenzie*, 168 Eng. Rep. 881 (K. B. 1820); *Beard* v. *State*, 74 Md. 130, 21 A. 700 (1891). To avoid such results, legislatures frequently indicated an intention not to abate pending prosecutions by including in the repealing statute a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated. See generally Note, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 121–130 (1972).

Section 1103 (a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is such a saving clause. It provides:

> "Prosecutions for any violation of law occurring prior to the effective date of [the Act] shall not be affected by the repeals or amendments made by [it] . . . or abated by reason thereof."

Petitioners contend that the word "prosecution" in § 1103 (a) must be given its everyday meaning. When people speak of prosecutions, they usually mean a proceeding that is underway in which guilt is to be determined. In ordinary usage, sentencing is not part of the prosecution, but occurs after the prosecution has concluded. In providing that "prosecutions . . . shall not be affected," § 1103 (a) means only that a defendant may be found guilty of an offense which occurred before May 1, 1971. The repeal of the statute creating the offense does not, on this narrow interpretation of § 1103

(a), prevent a finding of guilt. But § 1103 (a) does nothing more, according to petitioners.

Although petitioners' argument has some force, we believe that their position is not consistent with Congress' intent. Rather than using terms in their everyday sense, "the law uses familiar legal expressions in their familiar legal sense." *Henry* v. *United States*, 251 U. S. 393, 395 (1920). The term "prosecution" clearly imports a beginning and an end. Cf. *Kirby* v. *Illinois*, 406 U. S. 682 (1972); *Mempa* v. *Rhay*, 389 U. S. 128 (1967). In *Berman* v. *United States*, 302 U. S. 211 (1937), this Court said, "Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold*, 288 U. S. 206, 210; *Hill* v. *Wampler*, 298 U. S. 460, 464." *Id.*, at 212. In the legal sense, a prosecution terminates only when sentence is imposed. See also *Korematsu* v. *United States*, 319 U. S. 432 (1943); *United States* v. *Murray*, 275 U. S. 347 (1928); *Affronti* v. *United States*, 350 U. S. 79 (1955).[3] So long as sentence has not been imposed, then, § 1103 (a) is to leave the prosecution unaffected.[4]

We therefore conclude that the Court of Appeals properly rejected petitioners' motion to vacate sentence and remand for resentencing. The District Judge had

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[3] These cases involve determining whether a judgment in a criminal case is final for the purpose of appeal and determining whether the function of the trial judge has been concluded so that he may not alter the sentence previously imposed to include probation. The precise issues are, of course, different from the issue in this case. But these cases do show the point at which a prosecution terminates, and that is the issue here.

[4] Petitioners also argue that imposition of sentence precedes the suspension of sentence and the grant of probation. But the actions of the District Judge in imposing sentence and then ordering that it be suspended are usually so close in time that it would be unrealistic to hold that Congress intended so to fragment what is essentially a single proceeding.

no power to consider suspending petitioners' sentences or placing them on probation. Those decisions must ordinarily be made before the prosecution terminates, and § 1103 (a) preserves the limitations of § 7237 (d) on decisions made at that time.

II

The courts of appeals that have dealt with this problem have failed, however, to consider fully the special problem of the parole eligibility of offenders convicted before May 1, 1971. The Seventh and Ninth Circuits hold that such offenders are eligible for parole.[8] The First Circuit in this case stated that petitioners were "ineligible for suspended sentences, *parole*, or probation." 455 F. 2d 1181, 1191 (emphasis added).

In the federal system, offenders may be made eligible for parole in two ways. Any federal prisoner "whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of" his sentence. 18 U. S. C. § 4202. Alternatively, the District Judge, "[u]pon entering a judgment of conviction, . . . may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the

[8] See n. 2, *supra*. We were informed at oral argument that "the Board of Parole is now considering as eligible for parole only defendants who have been sentenced in the Seventh and Ninth Circuits for narcotics offenses." Tr. of Oral Arg., at 23. Our disposition of this case has no bearing on the power of the Board of Parole to consider parole eligibility for petitioners under 18 U. S. C. § 4202. See *infra*, —.

prisoner may become eligible for parole at such time as the board of parole may determine." 18 U. S. C. § 4208 (a).

Section 1103 (a) clearly makes parole unavailable under the latter provision. As we have said, sentencing is part of the prosecution. The mandatory minimum sentence of five years must therefore be imposed on offenders who violated the law before May 1, 1971. And Congress specifically provided that § 4208 (a) does not apply to any offense "for which there is provided a mandatory penalty." Pub. L. 85-752, § 7, 72 Stat. 847 (1958). In any event, the decision to make early parole available under § 4208 (a) must be made "[u]pon entering a judgment of conviction," which occurs before the prosecution has ended. Section 1103 (a) thus means that the District Judge cannot specify at the time of sentencing that the offender may be eligible for early parole.

That was the only question before the Court of Appeals, and it is therefore the only question before us. Petitioners' motion, on which the Court of Appeals ruled, requested a remand so that the District Judge could consider the sentencing alternatives available to him under the Comprehensive Drug Abuse Prevention and Control Act of 1970. That Act, however, did not expand the choices open to the District Judge in this case, and the Court of Appeals correctly denied the motion to remand. The availability of parole under the general parole statute, 18 U. S. C. § 4202, is a rather different matter,* on which we express no opinion.

Affirmed.

*The decision to grant parole under § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated. Whether § 1103 (a) or the general savings statute, 1 U. S. C. § 109, limits that decision is a question we cannot consider in this case.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join Part I of the Court's opinion and would affirm for the reasons there expressed. They are also of the view that § 1103 (a) forecloses the availability of parole under both 18 U. S. C. § 4202 and 18 U. S. C. § 4208 (a), and that even if this were debatable as to § 4202, that the general savings statute, 1 U. S. C. § 109 clearly mandates that conclusion as to that section. They therefore do not join Part II of the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 71-1304

James B. Bradley, Jr., et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[March 5, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The correct interpretation of the word "prosecutions" as used in § 1103 (a) of the 1970 Act was, in my view, the one given by the Court of Appeals of the Ninth Circuit in *United States* v. *Stephens*, 449 F. 2d 103, 105:

> "Prosecution ends with judgment. The purpose of the section has been served when judgment under the old Act has been entered and abatement of proceedings has been avoided. At that point litigation has ended and appeal is available. *Korematsu* v. *United States*, 319 U. S. 432, 63 S. Ct. 1124, 87 L. Ed. 1497 (1943). What occurs thereafter—the manner in which judgment is carried out, executed or satisfied, and whether or not it is suspended—in no way affects the prosecution of the case."

The problem of ambiguities in statutory language is not peculiar to legislation dealing with criminal matters. And the question as to how those ambiguities should be resolved is not often rationalized. The most dramatic illustration at least in modern times is illustrated by *Rosenberg* v. *United States*, 346 U. S. 273, where a divided Court resolved an ambiguity in a statutory scheme against life, not in its favor. The instant case is not of that proportion but it does entail the resolution of unspoken assumptions—those favoring the status quo of prison

systems as opposed to those who see real rehabilitation as the only cure of the present prison crises. As Mr. Justice Holmes said, "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 221.*

Judges do not make legislative policies. But in construing an ambigious word in a criminal code I would try to give it a meaning that would help reverse the long trend in this Nation not to consider a prisoner a "person" in the constitutional sense. Fay Stender writing in Maximum Security (1972) p. X has described some of the "tremendously sophisticated defenses against the least

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*Justice Holmes also said:

". . . in substance the growth of the law is legislative. And this in a deeper sense than that which the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that when ancient rules maintain themselves in this way, new reasons more fitted to the time have been found for them, and that they gradually receive a new content and at last a new form from the grounds to which they have been transplanted. The importance of tracing the process lies in the fact that it is unconscious, and involves the attempt to follow precedents, as well as to give a good reason for them, and that hence, if it can be shown that one half of the effort has failed, we are at liberty to consider the question of policy with a freedom that was not possible before." Common Carriers and the Common Law, 13 Amer. L. Rev. (1879) 609, 630–631.

increase in the enforceable human rights available to the prisoner."

A less strict and rigid meaning of the present Act would be only a minor start in the other direction. But it is one I take.